MAJLIS PERBANDARAN MELAKA BANDARAYA BERSEJARAH

v.

FIRST CONSOLIDATED SDN BHD

COURT OF APPEAL, KUALA LUMPUR
DENIS ONG JCA
MOHD SAARI YUSOFF JCA
AZMEL MAAMOR J
[CIVIL APPEAL NO: M-03-34-1995]
29 AUGUST 2002

CIVIL PROCEDURE: *Attachment - Garnishee order made absolute - Whether there was moneys owing to company - Whether sum in question was paid out*

The respondent had obtained an order for a judgment sum against Padu Ehsan Sdn Bhd ('PESB') in the Johor Bahru High Court. The respondent submitted that a contract existed between the appellant and PESB, and it was alleged that the appellant owed money to PESB. The respondent then applied for a garnishment order nisi under O. 49 r. 1(1) of the Rules of the High Court 1980. The senior assistant registrar heard the matter and refused to grant the order to be made absolute. The respondent appealed to the judge in chambers who granted the order to be made absolute. This was an appeal by the appellant, *ie*, the garnishee, against the said order.

The issue here was whether the appellant owed PESB money when it was contended that moneys had been disbursed to PESB in two interim payments.

Held:

[1] The learned trial judge had misdirected himself in not considering the statement of final account and the certificate of interim payment no. 3, and the endorsements on the two cheques by the Bank of Commerce. Had he done so, his conclusion would have different. (p 209 e)

[2] Evidence proved that the first and second interim payments had in fact been disbursed to PESB and therefore it could not be said that the appellant owed money to PESB. (p 209 f)

[Appeal allowed with costs; order of trial judge set aside.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Responden telah mendapatkan perintah untuk jumlah penghakiman ke atas Padu Ehsan Sdn Bhd ('PESB') di Mahkamah Tinggi Johor Bahru. Responden mengadu bahawa suatu kontrak terwujud antara perayu dan PESB, dan dihujah bahawa perayu berhutang wang kepada PESB. Kemudiannya, responden telah memohon untuk perintah garnisan nisi di bawah A. 49 k. 1(1) Kaedah-Kaedah Mahkamah Tinggi 1980. Penolong kanan pendaftar telah membicarakan perkara tersebut dan enggan untuk membenarkan perintah itu dijadikan mutlak. Responden membuat rayuan kepada hakim dalam kamar yang membenarkan perintah itu dijadikan mutlak. Ini adalah rayuan perayu, iaitu yang digarnis, terhadap perintah tersebut.

Isu di sini adalah sama ada perayu berhutang wang dengan PESB sedangkan terdapat hujahan bahawa wang telah dibayar kepada PESB melalui dua pembayaran-pembayaran interim.

Diputuskan:
Mohd Saari Yusoff HMR

[1] Hakim perbicaraan telah menyalah-arah dirinya dalam tidak mempertimbangkan kenyataan akaun akhir dan sijil pembayaran interim no. 3, dan endorsmen-endorsmen pada dua cek berkenaan oleh Bank of Commerce. Sekiranya dia membuat pertimbangan tersebut, keputusannya akan berlainan.

[2] Keterangan telah membuktikan bahawa pembayaran interim pertama dan kedua pada hakikatnya telah dibuat kepada PESB dan oleh itu tidak dapat dikatakan bahawa perayu berhutang wang dengan PESB.

Rayuan dibenarkan dengan kos; perintah hakim perbicaraan diketepikan.]

Legislation referred to:
Rules of the High Court 1980, O. 49 r. 1(1)

For the appellant - Adillah Ahmad Nordin (Kong Peng & J Amardas); M/s Nordin & Phua
For the respondent - Yau Jiok Hua; M/s Yau Jiok Hua & Co

[Appeal from High Court, Melaka; Civil Suit No: 22-113-1992]

Reported by M Maheswaran

JUDGMENT

Mohd Saari Yusoff JCA:

In the court below, the learned SAR who heard the application for a garnishment order nisi under O. 49 r. 1(1) RHC 1980 refused to grant the order to be made absolute. On appeal to the judge in chambers, the learned judge allowed the appeal and granted the order to be made absolute. Against the order, the appellant (garnishee) appealed.

Prior to the application for such garnishment order, the respondent (JC) obtained an order for a judgment sum of RM493,227.80 against Padu Ehsan Sdn Bhd ("PESB" for short) in the High Court at Johor Bahru (*vide* Civil Suit No. 22-114-1992). The judgment was not satisfied to the extent of RM153,448.02. Later, the respondent came to know that PESB was the earthwork contractor for the appellant (garnishee). Pursuant to the contract between the appellant and PESB, it was alleged that the appellant still owed money to PESB.

At the initial stage of the hearing of this appeal, the parties agreed that (exh. P7) p. 230 and (exh. P6) p. 234 to form part of the appeal record. They also agreed that pp. 231 to 233 and pp. 235 to 243 of the appeal record be expunged.

The dispute is over 1st and 2nd interim payments. The issue for determination is whether the first interim payment of RM530,200 and the second interim payment of RM184,700 had been disbursed to PESB.

The facts from the appeal record as narrated by En. Ng (the learned counsel for the appellant) was that the present case involved four interim payments, namely:

First payment	RM530,200
Second payment	RM184,700
Third payment	RM696,000
Fourth payment	RM300,000

The respondent (JC) did not dispute that payment nos. 3 and 4 had been made. The dispute was in respect of payment nos. 1 and 2. The appellant (garnishee)'s case was that payment nos. 1 and 2 totaling RM714,900 had been fully disbursed to PESB.

The court's attention was drawn to a number of documents. For the purpose of this appeal, we need only to mention certificate of interim payment no. 3 (exh. P6) at p. 234 of appeal record, Bank Negara cheque for RM530,200 (exh. P10) at p. 305 of appeal record, Bank Negara cheque for RM184,700 (exh. P11) at p. 312 of appeal record, statement of final account (exh. P3) at pp. 291 to 293.

In the case of certificate of interim payment (exh. P6), PESB acknowledged having received the sum of RM696,000. In the same document, the words "Bayaran Interim Terdahulu" RM714,900 were inserted therein, implying that said amount was disbursed to PESB. RM714,900 was the total amount of first and second interim payments.

The disbursement of RM714,900 is supported by the evidence of the two cheques (exh. P10 and exh. P11) which bear the endorsement of Bank of Commerce (M) Bhd. PESB's account with the Bank of Commerce is no. 04010550739007. The account number of PESB on the cheques and vouchers tallies.

The appellants case is further reinforced by the evidence of statement of final account (exh. P3). In that statement at p. 293 of appeal record, one Kuan Ee Leong director of PESB acknowledged receipt of interim payments (No. 1 to No. 4) amounting to RM1,710,900 which amount would have included payment nos. 1 and 2 totalling RM714,900. In the same statement at p. 293 of appeal record, the following words appear:

> Saya/Kami*, yang menandatangani di bawah ini mengaku penerimaan Perakuan Muktamad di atas dan setelah meneliti butir-butir terkandung di dalamnya, bersetuju dengan Bayaran Muktamad Disyorkan Kena Dibayar dan mengaku bahawa saya/Kami* tidak ada tuntutan lanjut di bawah kontrak ini.
>
> | t.t. | t.t. |
> | --- | --- |
> | Tandatangan Saksi | Tandatangan Kontraktor |
> | Nama Penuh: MD. NOR BIN AB HAMID | Nama Penuh: KUAN EE LEONG |
> | NO. K/P: 7267060 | NO. K/P: 4866046 |
> | Alamat: SSB-1 Batu 2 1/2
Bukit Baru Dalam
Melaka. | Padu Ehsan Sdn. Bhd.
391-N, (1st Floor), Jalan
Mawar, Taman Peringgit
Jaya, 75400 Melaka.
Tel. No: 06-247927
Fax/Tel. No: 06-247968 |
> | | ...
cap kontraktor |
> | Tarikh: 6 Oct 1993 | Tarikh: 6 Oct 1993. |

En. Yau, counsel for the respondent (JC), argued that there was no evidence that the amounts as stated in exh. P10 & 11 were credited into the account of PESB. Only endorsements appeared on the two cheques and anybody could have put the endorsements there.

In the judgment of the learned judge in the court below, his lordship at p. 42 of the appeal record said:

> I could only conclude from all the available facts that P10 and P11 never left the Jabatan Akauntan Negara's office and that no payments thus had been made to the judgment debtor. The unblemished and spotless cheques which caused the court to be even more suspicious of the assertion of PW3 could only support my findings that the garnishee still owed the judgment debtor to the tune of RM714,900.00.

The appellant argued that the learned judge in the court below failed to consider the endorsement by the Bank of Commerce on the two cheques (exh. P10 & 11). His lordship's observation about it was that both the cheques were unblemished, which as conceded by the respondent was not correct Further, in his judgment, the trial judge made no reference to exh. P3 and exh. P6. In this regard, we agree with the appellant that the learned judge misdirected himself in not considering exh. P3 and exh. P6 and the endorsements on the two cheques (exh. P10 & 11). Had the learned judge considered the endorsements on the two cheques together with the contemporaneous documents (exh. P3 & exh. P6), he would have reached a different conclusion.

In conclusion, upon a perusal of contemporaneous documents (exhs. P3, P6, P10 & 11) in totality, we are satisfied that first and second payment totaling RM714,900 were in fact disbursed to PESB. As such it could not be said that the appellant owed RM714,900 to PESB. In the premises, we allowed the appeal with cost here and below, set aside the order of the learned trial judge and further ordered that the deposit be refunded to the appellant.